

ORIGINAL

FILED
HARRISBURG, PA

JUL 29 2002

MARY E. D'ANDREA, CLERK
Per 578

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LEWIS JOHNSON
Plaintiff,

v.

ANTHONY PRINCIPI,
Secretary Of Veterans Affairs, et. al.,

Defendants

CIVIL ACTION NO. 1:CV-00-1873

JUDGE McCLURE

JURY TRIAL DEMANDED

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

Local Rule 56.1 requires that a motion for summary judgment must be accompanied by a separate *short* and *concise* statement of the material facts as to which the parties contend there is no genuine issue to be tried. Shortness and conciseness are ostensibly required to readily permit a simple admission and/or denial without unnecessary qualification and prolixity in response. Plaintiff therefore objects to Defendants' Statement of Undisputed Material Facts to the extent that they are neither short nor concise and/or are not material for purposes of Defendants' Motion.

To facilitate disposition of Defendants' Motion, the matters admitted by Plaintiff are to be taken as true for summary judgment purposes only, and Plaintiff reserves the right to test all Defendants' evidence at the time of trial.

1. Admitted
2. Admitted

3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted
8. Admitted
9. Admitted
10. Admitted
11. Admitted
12. Admitted
13. Admitted.
14. Admitted with the clarification that the Lebanon Center has used another means of filling vacancies in housekeeping positions on the basis of seniority. In this process, all housekeeping vacancies are offered first to other housekeepers who can fill the position on the basis of seniority before the position is posted generally. See Kiscadden deposition, p. 52-54.
15. Admitted
16. Admitted
17. Admitted in part and denied in part. It is admitted that reassignments in a RIF are done based upon seniority, but it is denied that that is the only time seniority is a dispositive factor in reassignments. As indicated in the deposition of Raymer Kent, the position at issue in this case should have been governed by the seniority provisions of Article 12. The RIF procedure

to which Defendants refer is simply a memorialization of how reassignments are conducted in general.

18. Admitted
19. Admitted
20. Admitted
21. Denied. Hypothetical "possibilities" are not material to any issues in this case, and are therefore denied.
22. Denied. Again, hypothetical circumstances are not material to any issues in this case, and are therefore denied.
23. Admitted in part. It is admitted that Hull was selected, and that the process was conducted as competitive; however, pursuant to a standing practice in housekeeping, the position should have been filled on the basis of seniority due to a standing practice in the VA that housekeeping positions were first offered to other housekeepers on the basis of seniority before being posted generally. *See* Kiscadden deposition, pp. 52-54. Moreover, Johnson had more experience than Hull as well and, even if he should not have gotten the job based upon his seniority, Johnson should have been selected on purely competitive procedures.
24. Denied. See preceding response.
25. Admitted in part. It is admitted that Johnson believed the MOU governed the selection process because he was told that it did. Defendants' recitation of this fact simply confirms a factual issue that must be resolved at the time of trial. Moreover, the MOU was consistent with the practice as stated in the deposition of Mr. Kiscadden.
26. Admitted

27. Admitted
28. Admitted
29. Admitted
30. Admitted with the clarification that Johnson was rated highest among the applicants.
31. Admitted with the clarification that the VA Lebanon Center followed a seniority-based practice through which Johnson should have been selected for the position.
32. Admitted
33. Admitted
34. Admitted
35. Admitted
36. Admitted
37. Admitted
38. Admitted
39. Admitted
40. Admitted
41. Admitted with the clarification that the seniority-based practice of offering positions in housekeeping to housekeepers at the same grade remained in existence during this time. Kiscadden Dep., pp. 53-54.
42. Admitted
43. Admitted
44. Admitted

45. Admitted with the clarification that the latter two criteria were added by Fidler as a means to support the selection of Hull. Johnson was rated higher by the initial review panel, see deposition exhibit , and he and Hull had the same score on their KSAO's. At that point, Johnson could have and should have been selected for the position, particularly given his seniority; however, Fidler added "supplemental" and "float observations" to the selection criteria, and scored Hull higher in these two subjective areas.
46. Admitted that she testified as such; however, in light of her past statements showing a racial bias, there is an issue of fact as to her true motivations.
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49. Admitted that she testified as such; however, in light of her past statements showing a racial bias, there is an issue of fact as to her true motivations.
50. Admitted that she testified as such; however, in light of her past statements showing a racial bias, there is an issue of fact as to her true motivations.
51. Admitted that Kohr's affidavit so states; however, in light of Fidler's past statements showing a racial bias, there is an issue of fact as to the true motivations for this action.
52. Admitted in part. Plaintiff has also shown a history of racially discriminatory treatment while employed at the VA.
53. Admitted
54. Admitted

- 55. Admitted
- 56. Admitted
- 57. Admitted
- 58. Admitted
- 59. Denied. Plaintiff has shown a history of racially disparate treatment, and has demonstrated that certain individuals orchestrated the selection process to legitimize his non-selection for the housekeeping position on 19-3 when, consistent with prior practice, that existed at all times through the present, Johnson should have been selected for the position on the basis of his seniority before the position was even posted.
- 60. Admitted
- 61. Admitted
- 62. Admitted
- 63. Admitted
- 64. Admitted
- 65. Admitted
- 66. Admitted
- 67. Admitted
- 68. Admitted
- 69. Admitted in part. Johnson went into the nurses bathroom after he was assaulted by Erickson and shoved around the nurses' station.
- 70. Admitted in part. The only dispute comes from Erickson's equivocation on this issue. Johnson at all times has said that Erickson contacted him.

71. Admitted
72. Admitted
73. Admitted
74. Admitted that Erickson so stated; however, Johnson has indicated that he felt he was being stalked by Erickson at this point because there was no reason that Erickson should have been in Johnson's work area, particularly after he was allegedly warned to stay away from Johnson.
75. Admitted with the clarification that an issue of fact exists based upon Kiscadden's statement as to whether Erickson was ever given the counseling in October.
76. Admitted. See foregoing response.
77. Admitted
78. Admitted
79. Admitted. By way of further answer, Plaintiff requested that the dismissed allegations be consolidated with the allegations in his 1998 non-selection complaint which had been scheduled for a hearing in June, 2000. The administrative Judge agreed to consider consolidation, but never formally ruled on Plaintiff's Motion. Plaintiff and the agency thereafter considered all agency charges as if they had been consolidated. See App. 1-10.
80. Admitted. See preceding response.
81. Admitted. See preceding response.
82. Denied. See App. 1-10.
83. Admitted with clarification – Refer to #79-82.
84. Denied. See # 79-82 and App. 1-10.

85. Admitted
86. Admitted
87. Admitted
88. Admitted
89. Admitted
90. Admitted
91. Admitted
92. Admitted
93. Admitted
94. Admitted
95. Admitted that is what Stuckey says.
96. Admitted that is what Stuckey says.
97. Admitted that is what Stuckey says.
98. Admitted
99. Admitted that is what Stuckey says.
100. Admitted that is what Stuckey says.
101. Admitted that is what Kent says.
102. Admitted with the clarification that Johnson had signed a release for the VA to obtain all necessary medical information from Philhaven, and that Stuckey refused to get the information to which he had access. Moreover, to the extent that Stuckey had any questions or concerns, Plaintiff and his representative remained available at all times to assist his processing.
103. See preceding response.

104. See preceding response.
105. Admitted
106. See response to 102. It is denied that Stuckey specifically discussed these matters with Plaintiff.
107. Admitted that is what Stuckey says.
108. Admitted that is what Kent says. See response to 102.
109. Admitted that is what Stuckey says.
110. Admitted
111. Admitted
112. Admitted
113. Admitted
114. Admitted
115. Admitted
116. Admitted
117. Admitted that is what Stuckey says.
118. Admitted
119. Admitted that is what Stuckey says.
120. Admitted
121. Admitted
122. Admitted
123. Admitted
124. Admitted

125. Denied. As indicated in the deposition of William Dumas, copy to be provided, Kent stated that he would not do anything else for "you people" whom both Johnson and Dumas (also a black male) took as referring to them based upon their race.
126. Denied. Johnson submits that a reasonable inference to the contrary can be drawn.
127. Denied. Johnson submits that a reasonable inference to the contrary can be drawn.
128. Admitted
129. Admitted
130. Admitted
131. Admitted
132. Admitted
133. Admitted. By way of further answer, Plaintiff requested that the dismissed allegations be consolidated with the allegations in his 1998 non-selection complaint which had been scheduled for a hearing in June, 2000. The administrative Judge agreed to consider consolidation, but never formally ruled on Plaintiff's Motion. Plaintiff and the agency thereafter considered all agency charges as if they had been consolidated. See App. 1-10.
134. Admitted. See preceding response.
135. Admitted. See preceding response.
136. Denied. See App. 1-10.
137. Admitted with clarification – Refer to #133-35.
138. Denied. See # 133-37 and App. 1-10.
139. Admitted.
140. Admitted

- 141. Admitted
- 142. Admitted
- 143. Admitted
- 144. Admitted with the clarification that the agency had not given Plaintiff any reasonable assurance that he could return to a safe work environment.
- 145. Admitted with the clarification that the agency had not given Plaintiff any reasonable assurance that he could return to a safe work environment.
- 146. Admitted with the clarification that the agency had not given Plaintiff any reasonable assurance that he could return to a safe work environment.
- 147. Admitted with the clarification that the agency had not given Plaintiff any reasonable assurance that he could return to a safe work environment.
- 148. Admitted
- 149. Admitted with the clarification that the agency had not given Plaintiff any reasonable assurance that he could return to a safe work environment.

Respectfully Submitted,




Andrew J. Ostrowski, Esquire
Pa. ID 66420
4311 North Sixth Street
Harrisburg, PA 17110
(717) 221-9500

Dated: July 29, 2002

CERTIFICATE OF SERVICE

I, Andrew J. Ostrowski, Esquire, hereby certify that I have served a true and correct copy of the foregoing document, by hand-delivery, addressed as follows:

Kate Mershimer, Esquire
Office of the United States Attorney
208 Walnut Street
Harrisburg, PA 17108

By 
Andrew J. Ostrowski, Esquire
4311 North Sixth Street
Harrisburg, PA 17110
(717) 221-9500

Dated: July 29, 2002